IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 88 of 2003
with
Civil Application No. 7839 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE KSHITIJ R.VYAS

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DALVADI KANJIBHAI TALSIDAS & 7 - Appellant(s)

Versus

BAIL RAMBHABEN SUNDABHAI & 5 - Defendant(s)

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Appearance :
MR ASHISH M DAGLI for Appellant(s) : 1 - 2,4 - 6.ABATED for Appellant(s) : 3,7 - 8.
MR KIRTIDEV R DAVE for Defendant(s) : 1 - 6.
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CORAM : HONOURABLE MR.JUSTICE KSHITIJ R.VYAS

Date : 21/11/2005

ORAL JUDGMENT

Having heard the learned Advocates appearing for the parties and considering the following substantial question of law involved in this

appeal, the appeal is admitted. Mr Kirtidev Dave, learned Advocate appearing for the respondents waives service of notice of admission:

> "Whether the appellate court is justified in reversing the judgment and decree passed by the trial court and thereafter leaving the remaining issues undecided ?"

With the consent of the learned Advocates for the parties, the matter is heard and disposed of finally today.

2. The facts of the case in brief are as under:

The appellants who are the original plaintiffs have filed a suit being Regular Civil Suit No.57/84 which was decided by the learned Civil Judge (S.D.), Dhrangadhra in favour of the plaintiffs. The plaintiffs have presented the said suit before the learned Civil Judge (S.D.) against the defendants alleging that the suit land being S.No.602/2 paiki land admeasuring 4 Guntha belong to them which is being encroached upon by the defendants and therefore, the plaintiffs have prayed to pass decree to remove the encroachment and the said land should be given to them. It is averred that land admeasuring 1 Acre of s.No.602/2 which is described in para 1 belonged to plaintiffs and the same has been sanctioned for non-agricultural purpose by the Collector, Surendranagar vide order dated 14.3.1983. It is the case of the plaintiffs that the defendants have encroached upon 4 Guntha of land out of 1 Acre land of s.no.602/2 paiki on

or before 4.4.1983 by constructing water tank. It is averred that the plaintiffs, therefore, on 18.6.1983 got their land measured through DILR and then came to know that land admeasuring 4 Guntha (404.44 sq.meters) has been encroached upon by the defendants. The land which is encroached upon is more specified in para 4 of the plaint. It is also averred that the adjoining land being s.no.602/1 belongs to the defendants towards western side of plaintiff's land. In spite of issuance of notice to the defendants, the defendants have not complied with the notice and hence the suit was filed and claimed relief as prayed for.

3. The defendants have challenged and resisted the suit by filing W.S. Vide Exh.12 inter alia, contending that it is not true that the defendants have encroached upon the land as alleged. It is alleged that DILR has measured the suit land and that fact is not within their knowledge and hence denied to be true. It is also averred by the defendants that they have constructed their boundary wall within their limits.

4. After considering the pleadings and evidence, the trial court decreed the suit in favour of the plaintiffs, against which the defendants have filed Regular Civil Appeal No.1/99 which was decided by the Ld.Joint District and Second Fast Track Judge at Dhrangadhra by its judgment dated 22.1.2001, by partly allowing and by setting aside the judgment passed by the trial court which is challenged in the present appeal.

5. I have gone through the reasonings and findings recored by the appeallate court. The learned Appellate Judge has reversed the judgment and decree passed by the trial court. It appears that the judgment and decree of the trial court were reversed on the ground that the trial court has committed error in relying on Exh.59 which has not been proved in accordance with law and also holding that the defendants have encroached upon the disputed land. It is also held by the court that the trial court was erred in holding that it is established that the plaintiffs were and are in possession of disputed land since beginning.

6. When this appeal came up for hearing before this court (coram: D H Waghela, J.) on 6.7.2005, after hearing the learned Advocates for the parties, for the purpose of taking measurements afresh in presence of representatives of both the parties of the disputed premises and obtaining a report, time of about three weeks was granted. In pursuance of the said order, DILR, Surendranagar has carried out measurements of the land in question by preparing a map which has been taken on record. Office to give exhibit nos. to the said map. On perusal, it is clear that the map produced is in conformity with the decree passed by the trial court, inasmuch as it gives all details about the encroachment as per the claim made by the plaintiffs in the plaint. As observed by Hon'ble Mr Justice D H Waghela, the parties proposed to abide by the map and measurements

which was taken. However, the learned Advocates for the opponents has now disputed the said map and measurements produced on record by letter dated 26.8.2005 addressed by DILR, Surendranagar to the Taluka Surveyor, Dhrangadhra.

In view of this dispute, this court, by order dated 14.11.2005 called upon the DILR, Surendranagar to remain present before this court and to explain the letter dated 26.8.2005. Today, Mr R P Kalivada, DILR, Surendranagar remained present and has stated that the measurements to the extent of the alleged encroachment, has been taken in presence of the parties and panchas. The said panchnama is taken on record. Office to give exhibit no. to this panchnama also. In view of the statement of the DILR, Surendragarar, it not necessary for this court to go into detail on the observations given by the appellate court on this dispute. In view of the same, I also see no merits in the contentions raised by Mr Mr Kirtidev Dave, learned Advocate for the defendants that even though the measurements carried out in presence of the parties, the map was drawn in absence of the parties and that the map also does not give correct idea as to whether the encroachment has been committed by the defendants.

7. Having gone through the measurements and the map produced by the DILR, it is not open for the defendants to raise any objection on the procedure having been followed/carried out by the DILR. In that view of the matter, in my opinion, this appeal succeeds and it is hereby allowed. The judgment and order passed by the learned Appellate Court dated 22.1.2003 is quashed and set aside and the judgment and decree passed by the trial court in Suit No. 57/84 dated 30.6.1998 is restored. In the facts

and circumstances of the case, no order as to costs.

In view of the order passed in the main matter, Civil Application No. 7839/03 does not survive. The same is accordingly disposed of. Rule discharged.

[Kshitij R Vyas, J.]

msp